

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

FEDERAL ENERGY REGULATORY  
COMMISSION, PETITIONER

v.

SOUTHLAND ROYALTY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY  
REGULATORY COMMISSION

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The State of Texas in its brief *amicus curiae* contends, and the States of Louisiana and New Mexico in their *amicus* briefs agree, that the position taken by the Commission in this case would "create a new and

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\*Pursuant to the provisions of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist on September 30, 1977 and most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, along with the Department of Energy, was activated on October 1, 1977. Section 705(e) of the Organization Act, 91 Stat. 607, provides for the substitution of the new Commission as a party in cases such as this. The term "the Commission" as used in this brief refers to either the Federal Power Commission or the Federal Energy Regulatory Commission, as appropriate.

disruptive title risk" (Texas brief 9) for prospective oil and gas lessees. As Texas sets forth the asserted problem, "The Commission held in the orders under review that a lessee can dedicate to an interstate sale all gas ever produced from the acreage he leases" (*id.* at 6). Since "[e]very acre of Texas land has probably been leased many times under now-expired leases," it follows from "the Commission's theory" that "any one or more of the prior lessees may have 'dedicated' the acreage to an interstate sale" (*ibid.*). Therefore: "A producer who holds a current lease on the acreage or is considering acquiring such a lease cannot determine whether unknown gas reserves that may underlie it have been dedicated to interstate sale. This uncertainty will deter onshore exploration of previously leased acreage." *Ibid.*; see *id.* at 7-16.

The fears expressed by Texas are based on a misunderstanding of the Commission's position in this case. The hypothetical situation that Texas poses and the title risks it would allegedly involve are far removed from both the facts and the Commission's position here.

Texas professes concern about a person who has acquired, or who might acquire, a mineral leasehold without knowledge that at some time in the past a prior lessee had dedicated gas reserves underlying that acreage to interstate service pursuant to a Commission certificate and had then abandoned production without obtaining abandonment authority from the Commission.<sup>1</sup> This case is quite different. It involves a continuous flow of natural

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<sup>1</sup>If the prior lessee obtained abandonment authority from the Commission, current or prospective lessees would have no problem, being free to sell gas produced from the lease on the intrastate market or, upon obtaining a certificate from the Commission, on the interstate market.

gas which was being produced by Gulf and sold to El Paso pursuant to certificates of unlimited duration granted by the Commission, and which Southland and the other reversionary mineral interest owners (Southland *et al.*) now assert the right to divert from interstate service by virtue of the expiration of the leases under which Gulf was operating.

The Commission's position in this case is based on the continuing nature of this flow, and on the attempt of respondents to cut it off without the Commission's authorization. Section 7(b) of the Natural Gas Act, 52 Stat. 824 (15 U.S.C. 717f(b)), provides that "[n]o natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained \* \* \*." Given the plain language of this section, the Commission takes the position that the certificated service being rendered by Gulf to El Paso may not be abandoned, either by Gulf or by Southland *et al.*, without the approval of the Commission as required by the Act. The Commission stands on this Court's holding in the *Sunray* case that once the service of supplying gas in interstate commerce has been authorized and has commenced, "there can be no withdrawal of that supply from continued interstate movement without Commission approval." *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 156, quoting *Atlantic Refining Co. v. Public Service Commission of New York (CATCO)*, 360 U.S. 378, 389.

Thus, what the Commission "held in this case" is not, as Texas asserts (brief 10; see also Southland brief 6), that by selling gas from "Blackacre" pursuant to a Commission certificate, a lessee "has dedicated to interstate service reserves that he himself never discovers," or has dedicated

"reserves that might be discovered on Blackacre by another producer, under a different lease, years after his own lease has terminated for failure of production or failure to develop" (Texas brief 10).<sup>2</sup> Indeed, the fear expressed by Texas could hardly be more remote from the facts of this case, where the sales and service conducted pursuant to the Commission's certificate were continuing, notorious, and enormous at the time the leases expired, and where they were peculiarly well known to Southland *et al.*, who had been receiving royalties from them.

In sum, there was no occasion in this case for the Commission to address the hypothetical situation posed by Texas, and it did not do so.

Nor is it true, as Texas asserts (brief 3, 12-13), that the Commission in other cases has embraced the position which Texas ascribes to it and finds so troubling here.<sup>3</sup> Texas relies on two cases now pending in the courts of appeals: *Wessely Energy Corp. v. Arkansas-Louisiana*

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<sup>2</sup>Texas describes the theory it attributes to the Commission as one based on a "covenant running with the land" (Texas brief 9-12). The Commission did use that phrase (A. 606), as we did in our opening brief (Brief for the Federal Power Commission, 16 n. 17), but in both cases the reference was to the language of the court of appeals in *Hunt v. Federal Power Commission*, 306 F. 2d 334, 342 (C.A. 5), reading as follows: "Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under §7(b) \* \* \*" (emphasis added).

<sup>3</sup>Of course, when a lessee has made certificated sales of gas from the leased acreage and has then assigned the lease, the absence of continuing production does not prevent the conclusion that reserves later discovered on the leased acreage by the assignee or another successor-in-interest have been dedicated to interstate service. See, e.g., *Cumberland Natural Gas Co.*, 34 F.P.C. 132, 138; *Mitchell Energy Corp. v. Federal Power Commission*, 533 F. 2d 258 (C.A. 5). Texas concedes (brief 9) that this doctrine "causes no difficulties \* \* \*".

*Gas Co. and the Federal Power Commission*, W.D. Okla., No. CIV-77-0159-B, issued July 29, 1977, appeal pending, C.A. 10, No. 77-1750; and *Northern Natural Gas Co. v. Crawford*, Federal Power Commission Docket No. CS71-6, orders issued September 29, 1976, and December 1, 1976, appeal pending *sub nom. Harrison v. Federal Power Commission*, C.A. 5, No. 76-4318 (see Texas brief 3, 12-13). In neither case is the Commission taking the position that Texas ascribes to it.

The *Wessely* case (see pp. 12-13 of the Texas brief ) is an action brought in federal district court to quiet title to an oil and gas leasehold estate against claims that natural gas produced from the leasehold was dedicated to sale to an interstate pipeline under the Natural Gas Act. The district court decided that a subsequent lessee is not bound by the interstate dedication made by a prior lessee whose lease had expired without production, and the Commission is presently appealing to the Court of Appeals for the Tenth Circuit. However, the Commission has taken no position on the merits of the question decided by the district court. Its brief in the court of appeals, dated October 13, 1977, argues only that the district court erred in ruling that the Commission lacked primary jurisdiction over the subject matter of the proceeding and in failing to require the appellee, Wessely Energy Corporation, to exhaust its administrative remedies before resort to the courts. As the brief states (at 18): "This is not to suggest that the decision on the merits by the court below is necessarily erroneous, but simply that Wessely's arguments should have been directed to the Commission in the first instance."<sup>4</sup>

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<sup>4</sup>The district court in one paragraph of its opinion (par. 13) did attribute a position on the merits to "the FPC." That would only have meant the Commission's counsel, and any such position has been withdrawn on appeal, where the Commission's brief states (at 18

In the *Harrison* case (see the Texas brief 13, and the Commission's principal brief 33 n. 32), a producer named Crawford had acquired life-of-the-reserves mineral leaseholds in six sections of a Texas county. Shortly thereafter he discovered gas and completed a producing well on one section, made a contract by which he committed all gas production from all six sections to an interstate pipeline (Northern), obtained a permanent certificate from the Commission authorizing the service contemplated by the contract, and began selling gas to Northern from wells on two of the sections. Ten years later, with sales from at least one of those sections continuing, he released his interest in the other four sections back to the lessor. Three days later, *Harrison et al.* took a new lease on those four sections, and within two months had discovered gas and completed a well. The Commission held that Crawford's certificate encompassed all six sections covered by his lease and contract, that the deliveries from two sections served to dedicate to Northern all gas from all six sections, and hence that gas could not be sold intrastate from any of the six sections—including the gas discovered by *Harrison et al.*—without first obtaining abandonment authority under Section 7(b).

*Harrison* is distinguishable from the hypothetical problem posed by Texas. If Crawford's dedication covered all six sections, as the Commission held, then production from the dedicated acreage was continuing at

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n. 9): "This brief includes no arguments on the merits. Counsel for the Commission are not free to substitute their judgment on the dedication issue for that of the Commission, and an argument either way by counsel would require speculation as to what the Commission would decide. \* \* \*." (A copy of the district court's order, judgment and opinion, dated July 29, 1977, and a copy of the Commission's brief on appeal are being lodged with the Clerk of this Court.)

the time Crawford gave up his interest in four of the six sections. In this respect *Harrison* resembles the instant case, though here it is the continuing production itself whose abandonment is at issue. Because of the continuing production in *Harrison*, the new lessees could not very credibly claim to be without notice of the ongoing interstate service, and they might have a claim against their lessor if they were.

Thus, neither of the cases noted by Texas bears out the fears expressed. In any event, both cases are still awaiting decision in the courts of appeals, leaving ample opportunity for those courts or this Court to avoid any undesirable results. The instant case, meanwhile, presents the sharply focused question whether an ongoing flow of interstate sales and service in natural gas, certificated by the Commission without limit of time, may be cut off and diverted to the intrastate market without the Commission's abandonment approval under Section 7(b). The Commission submits that it may not.

Respectfully submitted.

WADE H. MCCREE, JR.  
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DECEMBER 1977.